Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

(3)

No. 98-1805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GAIL MERCHANT IRVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Because the government's brief in opposition contains significant mischaracterizations regarding the factual and legal history of this unique case, the petitioner respectfully submits this reply.

1. The Government's Brief in Opposition Incorrectly Concludes that the Court Properly Applied the *Berkovitz* Test.

This Court's seminal decision of *Berkovitz v. United States*, 486 U.S. 531 (1988), establishes a two-prong test for determining when government torts are immunized under the discretionary function exception. First, the court must identify the act complained of and determine if it was a matter of choice for the acting employee. *Id.* at 536. Second, the court must determine if the choice was "grounded in social, economic, and political policy". *Id.* at 537. A negative answer to either exception permits the plaintiff's case to proceed. *Id.* The government's brief in opposition proclaims, without serious analysis, that the court of appeals "adhered to and correctly applied" the *Berkovitz* test. Br. Opp. at 9.

Echoing the error of the court of appeals, the government draws this conclusion without even reaching the first crucial inquiry under prong one of the test -- identifying the act complained of. The act complained of is the defendant's failure to actually inspect (and thus the failure to cite) the machine in question during either of the two pre-accident inspections.

Again mirroring the erroneous analysis of the court of appeals and omitting sincere dialogue, the government

also fails to discuss the next inquiry under prong one of the test -- whether the failure to inspect the machine was a matter of choice. "[C]onduct cannot be discretionary unless it involves an element of judgment or choice". *Id.* at 536. The unchallenged finding of the trial court was that the failure to inspect was due to simple inadvertence (i.e. a mistaken belief by the inspectors that they *had* inspected the machine in question).[1] *There is not a shred of evidence, from any source, which would support the conclusion that the inspectors in this case made a judgment call or a conscious choice not to inspect the machine which injured Ms. Irving.* Where, as here, the act complained of is the result of mistake or inadvertence, rather than a calculated decision "to act according to one's judgment of the best course",[2] "then there is no discretion in the conduct for the discretionary function exception to protect." *Berkovitz*, 486 U.S. at 536.

As to the final inquiry under prong one of the test, the brief in opposition focuses on the general statutory provisions surrounding OSHA inspections and the holdings of other FTCA cases involving OSHA. *See* Br. Opp. at 9-10. In so doing, the brief overlooks an additional and critical aspect of prong one of the test -- was the failure to inspect a matter of choice *for the inspectors themselves? Berkovitz*, 486 U.S. at 536. The general authority granted to OSHA superiors is irrelevant in a case where, as here, ground-level inspectors were given specific instructions to inspect the entire plant, including the machine in question. *See* Pet. App. E13-E15. This is because the inspectors had "no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536.

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[1] *See* Pet. at 20-21.

[2] *Dalehite v. United States*, 364 U.S. 15, 34 (1953).

Accordingly, as the dissent said of the en banc majority, the brief in opposition merely "pays lip service to the appropriate focus" required by *Berkovitz*. Pet. App. A-48. Even cursory examination of the opinion of the en banc majority reveals a fundamental misconstruction of *Berkovitz*, thus warranting review by this Court.

2. The Government Was *Not* Legally Precluded From Raising the Discretionary Function Defense in the Instant Appeal; It Simply Made a Conscious and Informed Decision To Waive It.

Ms. Irving's petition points out that the discretionary function issue, now at the heart of this dispute, was formally waived by the government as an appellate issue. Pet. 9-10. Straining credibility to the breaking point, the government now claims that it waived the defense because it was legally precluded from raising it in this appeal. Br. Opp. at 11. A quick chronological review confirms the clear fallacy of this contention.

The government's claim is based on the inaccurate premise that, after rejecting discretionary function arguments in each of the first three appeals, the First Circuit precluded the government from renewing this defense. *Id.* But the First Circuit said exactly the opposite. Following the third appeal, the directive from the First Circuit was that "...the government is free to renew its argument that the inspectors' actions fell within the discretionary function exception ...". *Irving v. United States*, 49 F.3d 830, 837 (1st Cir. 1995)(Pet. App. F-13).

There can be no doubt that the government understood this clear message from the First Circuit for at

least three reasons (in addition to the inherent clarity of the language itself):

1. Shortly after that opinion was issued, the government did just what the First Circuit invited -- it renewed its discretionary function defense in pretrial proceedings before the new district court judge. *See* Defendant's Memorandum of Law in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment (June 29, 1995).[3]

2. Next, at the ensuing trial before Judge McAuliffe, the government again renewed the discretionary function defense. *See* Defendant's Proposed Findings of Fact and Conclusions of Law #11 at 7 (11-21-95)[4](requesting a trial court ruling that Irving's case is barred by the discretionary function exception); *see also* Pet. App. E-32 (trial court rejecting, on the merits, government's "...argument that the discretionary function exception bars Irving's suit entirely.").

3. After judgment was rendered in Irving's favor on August 29, 1996, the government initiated the fourth appeal to the First Circuit (which eventually gave rise to the present appeal to this Court). In its Civil Appeal Pre-Argument Statement dated 12-30-96,[5] under the heading "Issues Proposed to be Raised On Appeal", the

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[3] For the Court's convenience, copies of the following documents (referred to in this brief) have been lodged with the Clerk's Office:

1. Government's "Brief of Appellant" dated January, 1997
2. Government's "Civil Appeal Pre-Argument Statement" dated 12-30-96
3. Defendant's Proposed Findings of Fact and Conclusions of Law dated 11-21-95
4. Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment dated 6-29-95

[4] *See* note 3, *supra.*

[5] *See* note 3, *supra.*

government listed three issues, the first being "Whether the claim is barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a)".

It was only after this third failed attempt to escape under the discretionary function exception that the government decided to formally abandon the defense. *See* Part 3 *infra*. One need not wonder whether the government was precluded from raising the discretionary function issue in the aftermath of the third appeal to the First Circuit when, as shown above, the government did in fact raise the defense on at least three separate occasions before deciding to concede it. Thus, the government's current contention is belied by its own conduct earlier in the case.

3. There Can Be No Dispute That the Government Explicitly and Knowingly Waived the Discretionary Function Defense in Its Underlying Appeal to the First Circuit.

The government's brief in opposition next attempts to deny that the government waived the discretionary function issue for the purposes of this appeal. Br. Opp. at 11-12, note 4. This denial represents another unfortunate breach of candor.

Within a month of filing the Civil Appeal Pre-Argument Statement designating the discretionary function question as one of three appellate issues, the government filed its "Brief of Appellant" with the First Circuit. Unlike the Pre-Argument Statement, the brief lists only one "Issue For Review", the so-called "good Samaritan" issue. [6] *See*

[6] In its current brief to this Court, the government cleverly suggests that its "principal" argument in the January, 1997 brief concerned the good Samaritan issue. Br. Opp. at 3. In fact, the good Samaritan issue was

Government Brief of January 1997,[7] at 1 ("Whether the United States, if a private person, would be liable to the plaintiff under similar cicumstances [sic] under the law of New Hampshire"). The other two issues which had been designated just a month before (the discretionary function exception and the misrepresentation exception) were unequivocally abandoned.

We know that the government did not simply overlook the discretionary function issue because its brief explicitly states that it had chosen not to raise the discretionary function issue on appeal.

> ... *the United States does not appeal the court's finding regarding the application of the discretionary function exception to this case. Id.* at 4-5, note 1 (emphasis supplied).

The government even took care to explain why, after 17 years of stubbornly asserting this defense, the concession was being made. The reason was *not*, as the government now claims, that it was legally precluded from continuing to raise the discretionary function exception. The concession was made:

> [b]ecause the district court's finding is limited to the specific factual circumstances it found existed during the time and area covered by Mr. Amirault's [the OSHA Area Director] testimony .... *Id.*

In other words, the government made a calculated decision that its interests were better served by not elevating this issue to the court of appeals level.

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the *only* argument raised in that brief. The brief does not contain any argument whatsoever concerning the discretionary function exception.

[7] *See* note 3, *supra*

With this backdrop, it is absurd for the government to state, as it has done in its current brief to this Court, that the concession is "quote[d] ... out of context". Br. Opp. at 11-12, note 4. There is no other context in which to put the phrase "the United States does not appeal ... the discretionary function exception." The government had the freedom to determine which appellate issues to raise and which to abandon, guided presumably by principles of good faith and candor toward the tribunal. The government chose to abandon the discretionary function defense, and the above phrase was clearly designed to put the court and the plaintiff on notice of the concession and, thus, the fact that the issue would not be discussed in the brief.[8]

4. Contrary to the Government's Contention, the *Sua Sponte* Order of June 8, 1999 Did Constitute a Recall of the Mandate.

The government contends that, in the aftermath of the April 8, 1998 panel decision in favor of Irving, the mandate never issued. Br. Opp. at 6. Thus, the government claims, the First Circuit retained jurisdiction to "withdraw" the decision, *sua sponte*, two months later. As a preliminary matter, one wonders how (after 19 years, two trials, four appeals, an explicit government waiver, and no post-judgment request for reconsideration) a *sua sponte* "withdrawal" two months after the final decision is somehow less unfair to Gail Irving than a *sua sponte* "recall" two months after the final decision. In any event, the Federal Rules of Appellate Procedure clearly confirm that the mandate was *required*[9] to issue on June 2, 1998,

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[8] *See supra* note 6.

[9] Under Rule 41, the issuance of the mandate on the prescribed date is mandatory. Fed. R. App. P. 41 (b)("mandate *must* issue 7 days after

and thus the June 8 recall came several days *after* the mandatory issuance of the mandate. Given this undisputed fact, the government's argument is one of semantics, and the June 8, 1998 order must be considered at least a de facto recall of the mandate.

In light of the above, the government's representation (that the clerk of the First Circuit apparently confirmed, via telephone, that it has no record of a mandate having issued), Br. Opp. at 7, note 2, merely reflects further error on the part of the First Circuit. The Rules required that the mandate be issued on June 2, 1998, or that the court issue an order extending the Rule 41 deadline, but apparently neither happened. Under such circumstances, the en banc order of June 8, 1998 must be evaluated in the same way as an actual recall of the mandate. After two decades of litigation, the fate of Ms. Irving should not be reduced to a semantics game regarding how best to label a recall which, everyone agrees, came two months after the judgment in her favor and at least 6 days after the mandatory date for issuance of the mandate.

The *Calderon* analysis suggests the same conclusion. *Calderon v. Thompson*, 118 S. Ct. 1489 (1998). *Calderon* set forth the stringent standard for the recall of a mandate and reversed the Ninth Circuit's recall in the underlying case. The opinion compels the same result in a case like the present which, but for an unlawful failure to observe the requirements of Rule 41, would have concerned a recall procedurally identical to that in *Calderon*. Significantly, *Calderon* held that the standard *is never met by court oversight in failing to call for review*

..."](emphasis supplied). Although the prescribed date may be extended by court order, *Id.*, no such order has ever been issued in this case, either before or after the fact.

within the stated deadline, especially when the only consequence is an inability to conduct en banc review of a case already reviewed by a panel. *Id.* at 1499. Citing a "deep rooted policy in favor of the repose of judgments", *Id.*, the *Calderon* Court stated that such a recall is improper "[e]ven if [it] were a case *implicating no more than ordinary concerns of finality.*" *Id.* at 1498. (emphasis supplied).[10]

5. The Government's Discussion of this Waiver of the Discretionary Function Exception, and the Effect of Same on the Court of Appeals, Misstates the Plaintiff's Argument.

The government having clearly waived the discretionary function defense, the question arises as to whether, notwithstanding the waiver, the First Circuit was "nonetheless bound to consider it" *sua sponte*. Pet. App. A-8, A-9. The government once again misstates the petitioner's argument. Br. Opp. at 12. The petitioner's claim is that the First Circuit violated the teachings of this Court in holding that it was *required* to raise the issue *sua sponte* notwithstanding the government concession. *See* Pet. 24-25 (discussing many cases in which this Court has accepted government concessions of the discretionary function exception). This legal error was critically prejudicial to Ms. Irving because, after all, the clear implication of the majority opinion is that, after "two decades of needlessly protracted litigation", Pet. App. A-28, it would not have recalled the judgment in her favor absent

[10] As to the issue of finality, there is no dispute that (a) a judgment for Ms. Irving was entered on April 8, 1998, and (b) the government's time limit for requesting any post-judgment relief from the First Circuit had expired as of the time of the *sua sponte* recall.

the (erroneous) belief that it had a binding obligation to do so.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the writ of certiorari should be granted.

Respectfully submitted,

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August 2, 1999

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